

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIAM TRUPPI et al.,

Plaintiffs and Respondents,

v.

PASCO ENGINEERING, INC., et al.,

Defendants and Appellants.

(Super. Ct. No. 37-2009-00104790-  
CU-BC-CTL)

D059494

JOHN A. QUATTRO,

Plaintiff and Respondent,

v.

PROPERTY MANAGEMENT  
CONTRACTORS, INC., et al.,

Defendants and Appellants.

(Super. Ct. No. 37-2009-00063411-  
CU-BC-BC)

APPEAL from an order of the Superior Court of San Diego County, Luis R.

Vargas, Judge. Affirmed.

This construction defect action arises out of the construction of two homes in Encinitas, California, by defendant Property Management Contractors, Inc. (PMCI). PMCI entered into a contract with plaintiff William Truppi for construction of a house at 560 Neptune and a contract with plaintiff John Quattro for construction of a house at 566 Neptune. Both contracts contained an arbitration provision requiring the resolution of any dispute arising out of the contracts by arbitration.

Quattro subsequently sued PMCI and its principal, William Gregory, alleging construction defects—not on the 566 Neptune home for which he contracted, but on the 560 Neptune house that was contracted for by Truppi. Quattro alleged in his complaint that he was the true contracting party and/or a third party beneficiary of Truppi's contract.

In response to Quattro's lawsuit, PMCI and Gregory filed a petition to compel arbitration. The court denied the petition because neither Quattro nor Gregory were signatories to the 560 Neptune contract that contained the arbitration provision because that contract was between PMCI and Truppi only.

PMCI and Gregory appeal, asserting Quattro is subject to the arbitration provision because (1) he is seeking rights and remedies under the contract and thus is "estopped" to deny that the arbitration provision applies to him, (2) he claims to be a third party beneficiary of the contract, (3) he has a "close relationship" with Truppi who did sign the contract, and (4) Gregory can enforce the agreement even though he did not sign it in his individual capacity. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Background

PMCI and its principal, Gregory, were involved in the construction of two homes in Encinitas, California. PMCI entered into a contract with Truppi for construction of a house at 560 Neptune (the 560 contract) and a contract with Quattro for construction of a house at 566 Neptune (the 566 contract). Both contracts contained an arbitration provision requiring the resolution of any dispute arising out of the contracts by arbitration. Specifically, the arbitration clause stated:

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with Construction Industry Arbitration Rules as provided by law, and judgment upon the award rendered by the arbitrator(s) may be entered in any Court having jurisdiction thereof. OWNER, CONTRACTOR, ARCHITECT and all Subcontractors, Sub-Subcontractors, material suppliers, and other parties concerned with the construction of the project are bound, each to the other, by this arbitration clause, *provided each party has signed this contract or a contract that incorporates this contract by reference, or signs any other agreement to be bound by this arbitration clause.* On the demand of the arbitrator or any party to an arbitration initiated under the arbitration provisions of this contract, OWNER, CONTRACTOR, and any Subcontractors, Sub-Subcontractors, or other party bound by this arbitration provision agrees to join, become a party to, and be bound by such arbitration proceedings. If any party refuses or neglects to appear at or participate in such arbitration proceedings, the arbitrators are empowered to decide the controversy in accordance with whatever evidence is presented by the party or parties who do participate. The arbitrators are authorized to award any party or parties such sums as they consider proper for the time, expense, and trouble of arbitration, including arbitrator fees and attorney's fees." (Italics added.)

The 560 contract was signed by Gregory as an officer of PMCI, not in his individual capacity.

## *B. The Instant Action*

### *1. First amended complaint*

Quattro, acting in propria persona, brought the instant action against PMCI and Gregory (in his individual capacity) on the 560 contract that PMCI executed with Truppi. In that complaint, Truppi claimed to be "the owner, contracting party, had the beneficial interest, and is, and was the real party in interest of the real property commonly referred to as 560 Neptune Avenue, Encinitas, California," and that PMCI and Gregory "recognized and believed Quattro as the contracting party and/or beneficiary of the contract." Quattro further alleged that it was "at [his] direction" that Truppi entered into the 560 contract with PMCI and Gregory, that they were "undeniably [] in privity with Quattro," and that performance of the 560 contract was carried out by Quattro, not Truppi.

The complaint further alleged that Quattro had been "induced into contracting with [PMCI and Gregory] to construct the residence on the 560 Neptune Property" and that he alone had been damaged by the allegedly improper work on that property by PMCI and Gregory. Quattro also alleged that although Truppi entered into the 560 contract with PMCI and Gregory, all parties knew that "Quattro was the actual owner and held beneficial title and interest in the property on behalf of Truppi."

### *2. PMCI and Gregory's demurrer*

PMCI and Gregory demurred to the first amended complaint, citing a declaration Quattro had filed in an earlier action filed by Truppi in which Quattro stated that he was not the real party in interest with respect to claims filed as to the 560 Neptune property

and a declaration in another related lawsuit where Quattro stated that "Truppi was at all times the record owner of the 560 Neptune property" and that Quattro "had only a 'prospective beneficial interest in the property upon its eventual sale or lease.' " The court sustained the demurrer, but granted Quattro leave to file a second amended complaint provided he "provide a satisfactory explanation for these inconsistent statements."

### *3. Second amended complaint*

In his second amended complaint, Quattro added five additional paragraphs attempting to explain the discrepancies between his allegations in the complaint and the declarations in the prior, related litigation. The second amended complaint then went on to make the same material allegations as the first amended complaint; i.e., that Quattro, not Truppi, was the actual contracting party and owner of the 560 property.

### *4. Demurrer to second amended complaint*

PMCI filed a demurrer to the second amended complaint. In that demurrer, PMCI and Gregory asserted that Quattro lacked standing to sue because he "has previously testified under oath that he did not own those claims, but those claims were owned by Truppi." The court overruled that demurrer.

### *5. PMCI and Gregory's general denial*

After the court overruled their second demurrer, PMCI and Gregory filed a general denial to Quattro's second amended complaint. Notably, in doing so, they asserted in one affirmative defense that Quattro was "not the real party in interest" on the 560 contract and "therefore lacks capacity to sue."

### *C. Petition To Compel Arbitration*

PMCI and Gregory brought a petition to compel arbitration based upon Quattro's allegations in the second amended complaint. They argued that although he did not sign the 560 contract, because he asserted that he was the "real party," "contracting party," and/or "third party beneficiary" of the 560 contract, he should be bound by the arbitration clause contained in that agreement. In that motion, PMCI and Gregory submitted as exhibits e-mails to Quattro from their attorney stating, "While my client disputes that you are a party, and that you lack standing to assert the claim, to the extent you do so I believe you are obligated to proceed by way of arbitration."

Quattro opposed the motion, asserting that the arbitration clause in the 560 contract stated that it only binds parties that signed that agreement. Thus, he contended that because he never signed the 560 contract, he was not bound by the arbitration provision.

In their reply papers, PMCI and Gregory argued that "[d]efendants have not conceded Quattro is a party to [the 560 contract]. They still contest whether he can enforce that contract based on his prior admissions that that he had no interest in [the] 560 [contract]." They further stated, "Quattro does not have standing to assert claims arising out of that contract."

### *D. Court's Ruling*

The court denied PMCI and Gregory's petition. In doing so, the court stated "since neither Plaintiff Quattro nor Defendant Gregory are signatories to any written agreement to be bound by the arbitration clause, by its express terms, the arbitration provision in the

Contract does not apply to Defendant Gregory and Plaintiff Quattro." The order does not reference PMCI.

## DISCUSSION

### I. APPLICABLE LEGAL PRINCIPLES

Code of Civil Procedure section 1281.2 governs petitions to compel arbitration and provides:

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy *if it determines that an agreement to arbitrate the controversy exists*, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement." (Italics added.)

Thus, contractual arbitration is available only when the parties have agreed to arbitrate a controversy. (*Herman Feil, Inc. v. Design Center of Los Angeles* (1988) 204 Cal.App.3d 1406, 1414 [arbitration "only comes into play when the parties to the dispute have agreed to submit to it"].) "'Absent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived.'" (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 569.)

"The right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract. [Citations.] There is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate." (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.)

## II. ANALYSIS

Based upon the foregoing authorities, unless an exception applies, PMCI and Gregory cannot enforce the arbitration clause against Quattro because neither Quattro nor Gregory (in his individual capacity) signed the 560 contract. PMCI and Gregory raise several arguments as to why this general rule does not apply, all based upon the allegations Quattro made in the second amended complaint that he was the true contracting party on the 560 contract. We address PMCI and Gregory's contentions in order.

### A. Estoppel

PMCI and Gregory contend that even though Gregory and Quattro are not signatories to the 560 contract containing the arbitration agreement, nevertheless, based upon the allegations of his second amended complaint, Quattro should be "estopped" from claiming the arbitration agreement does not apply to him. This contention is unavailing.

*Brodke v. Alphatec Spine, Inc.* (2008) 160 Cal.App.4th 1569 (*Brodke*) is instructive. In that case, the plaintiffs sued for fraud and breach of contract against the defendants, under a written contract that contained an arbitration clause. (*Id.* at p. 1572.) The defendants brought a petition to compel arbitration, which the court granted. (*Ibid.*) However, at the same time, the defendants contested the existence or validity of any written agreements with the plaintiffs. (*Id.* at pp. 1572-1573.)

Based upon the defendants' inconsistent positions, the Court of Appeal reversed the trial court's grant of the petition to compel: "In seeking enforcement of the contract,



defendants have the burden under [Code of Civil Procedure] section 1281.2 to allege the existence of a written agreement to arbitrate. Their petition serves the function of a complaint for specific performance. [Citation.] Absent an allegation of the existence of an agreement to arbitrate, the petition fails to state a cause of action for specific performance." (*Brodke, supra*, 160 Cal.App.4th at p. 1575.)

The Court of Appeal in *Brodke* held: "Defendants cannot rely on the allegations in the complaint to meet their pleading burden. While plaintiffs' admissions are an appropriate means by which the existence of an agreement may be *proved*, there is simply no reason to prove anything until the moving party alleges the existence of that which is to be proved." (*Brodke, supra*, 160 Cal.App.4th at p. 1575.) The *Brodke* court further stated, "[D]efendants did not affirmatively allege the existence of a written agreement to arbitrate. They did the opposite. They 'contest[ed] the existence or validity of any such agreements' with plaintiffs. Thus, defendants failed to satisfy the most basic statutory prerequisite to granting the petition—to allege the existence of a written agreement to arbitrate." (*Id.* at p. 1574.) The *Brodke* court rejected the notion "that a party petitioning to enforce an arbitration clause may simultaneously deny the existence of the very contract sought to be enforced." (*Id.* at p. 1575.) And it held there was no public policy reason to "compel the enforcement of a contract on behalf of a party who denies the very existence of the contract sought to be enforced." (*Id.* at p. 1577.)

Likewise in this case, in both their demurrers, general denial, and indeed in their petition to compel arbitration, PMCI and Gregory denied the existence of an agreement between themselves and Quattro on the 560 contract. Thus, as in *Brodke*, they cannot

rely on Quattro's allegations that he was a party to that agreement to compel arbitration because they, by their admissions, contend no such agreement exists. Indeed, PMCI and Gregory ignore the *Brodke* decision entirely in both their opening and reply briefs on appeal.

Moreover, PMCI and Gregory's reliance upon *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64 is unavailing. There, it was held that a party who had not signed a contract containing an arbitration clause could nonetheless be compelled to arbitrate when he sought to enforce other provisions of the same contract. (*Id.* at pp. 76-77.) However, that case is easily distinguishable. In that case the party seeking to compel arbitration *signed* the agreement in question, and, most important, did *not* deny the validity or existence of the agreement. (*Ibid.*)

#### B. *Quattro As A Third Party Beneficiary*

A nonsignatory in some circumstances can be compelled to arbitrate where the nonsignatory is a third party beneficiary of the contract containing the arbitration agreement. (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 242; *Matthau v. Superior Court* (2007) 151 Cal.App.4th 593, 599-600.) However, that is not the case here.

Three of the cases cited by PMCI and Gregory in support of this contention—*RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.*, *supra*, 47 Cal.App.4th 237 and *Cione v. Foresters Equity Services, Inc.* (1997) 58 Cal.App.4th 625—involved situations where the third party beneficiary was the party *compelling* arbitration. These cases are

inapplicable because here they seek to have the alleged third party beneficiary (Quattro) compelled by a *nonsignatory* (Gregory).

The fourth case cited by PMCI and Gregory, *Harris v. Superior Court* (1986) 188 Cal.App.3d 475, is also inapposite. That case involved a doctor who was compelled under a third party beneficiary theory, but only because the arbitration contract expressly expanded those subject to the agreement, using the term "employees and other contracting health professionals," and the doctor was an employee of the medical group. (*Id.* at p. 477-478.) No such inclusive or expansive language was in the arbitration agreement with Truppi and PMCI allowing any other parties to be compelled to arbitrate their claims. Rather, the arbitration clause at issue in this case expressly limited its application to persons or entities that signed the 560 contract.

### C. *Quattro's "Close" Relationship with Truppi*

There is a limited exception allowing nonsignatories to be bound in the event of a "close relationship" between the nonsignatory and one who did sign the agreement containing the arbitration clause. Examples of such relationships include agency, spousal relationship, parent-child relationship, and the relationship of a general partner to a limited partnership. (See *Matthau v. Superior Court, supra*, 151 Cal. App. 4th at p. 599.)

Appellants allege Quattro is really Truppi's agent, citing the allegations of the second amended complaint. This purported agency, according to PMCI and Gregory, makes Quattro as much a party to the contract as Truppi. However, contrary to PMCI and Gregory's contention, Quattro's complaint, does *not* allege that Quattro is Truppi's agent. Further, as discussed, *ante*, the 560 contract's arbitration clause required

signatures of the parties to be effective. Finally, Quattro is not defined as an agent in the 560 contract. As we have explained, *ante*, "Arbitration is a favored method of resolving disputes, but the policy favoring arbitration does not eliminate the need for an agreement to arbitrate and does not extend to persons who are not parties to an agreement to arbitrate." (*Matthau, supra*, 160 Cal.App.4th at p. 1271.)

*D. Gregory Right To Compel Arbitration Individually*

Gregory asserts that he can enforce the arbitration provision even though he did not sign the 560 contract in his individual capacity because (1) he is the principal and agent of PMCI, and (2) he is alleged in the second amended complaint to be the alter ego of PMCI. These contentions are unavailing.

As discussed, *ante*, PMCI and Gregory dispute the existence of any agreement with Quattro in their general denial and opening brief. Again, "[b]ecause defendants contested the existence of 'any' written agreements with plaintiffs in the court below, they cannot argue otherwise on appeal." (*Brodke, supra*, 160 Cal.App.4th at p. 1576.) Thus, Gregory cannot enforce the arbitration clause under any theory.

Moreover, the case Gregory cites for the proposition that he can enforce the arbitration clause in the 560 contract, *Keller Construction Co. v. Kashani* (1990) 220 Cal.App.3d 222, is inapposite. That case held that a "sole general partner of a limited partnership under the facts of this case is subject to an arbitration agreement between the partnership and a third party" because he was "the agent and a beneficiary of the partnership . . . ." (*Id.* at p. 229.)

However, this is not a case involving a general partner in a limited partnership. Moreover, in that case the third party was a signatory to the contract containing an arbitration provision. Here, as previously discussed, Quattro was not a signatory to the 560 contract.

In support of his contention that he can enforce the arbitration provision because Quattro in his complaint has alleged that Gregory is the alter ego of PMCI, Gregory relies on *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1282, 1285, where the Court of Appeal held that individual defendants, although not signatories to the agreement to arbitrate, could enforce the arbitration agreement against the plaintiff because they were alleged to be alter egos of the corporation with whom the plaintiff contracted. However, in that case, again, the plaintiff signed the agreement containing the arbitration clause. Here, it is undisputed that Quattro never signed the 560 contract.

#### DISPOSITION

The order denying PMCI and Gregory's petition to compel arbitration is affirmed. Quattro shall recover his costs on appeal.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.